BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

ANTONIO ZEPEDA
(Claimant-Respondent)

PRECEDENT
BENEFIT DECISION
No. P-B-40
Case No. 68-925

S.S.A. No.

DEPARTMENT OF EMPLOYMENT
(Appellant)

The Department of Employment appealed from Referee's Decision No. OAK-5638 which held the claimant was unemployed during the week ended October 28, 1967, within the meaning of section 1252 of the Unemployment Insurance Code. Oral argument was presented on behalf of the Department of Employment and on behalf of the claimant in San Francisco on June 14, 1968.

STATEMENT OF FACTS

The claimant was last employed as a millman by an employer in Hayward, California for approximately three months and was laid off on October 23, 1967. Effective October 22, 1967, the claimant filed a new claim for unemployment benefits. His weekly benefit amount was established at $48.

When the claimant was laid off from his employment, he received, in addition to the accumulated pay due, $87.88 identified as pro rata vacation pay. This amount was paid in accordance with the collective bargaining agreement which exists between the employer's association to which the claimant's most recent employer belonged, and the Millmen's Union, Local No. 550.

The pertinent provisions of this contract are found in section 19 and read as follows:

"(a) All employees doing work under the terms of this Agreement, shall be entitled to a vacation with pay, subject to the following terms and conditions.

"(b) To be eligible for the following vacation benefits, an employee must have worked not less than 1400 hours during a vacation year. A vacation year is 12 successive months of continuous employ as defined in Section 15, of this Agreement following an anniversary date of the employee's date of hire. Not more than 40 hours shall be accumulated toward vacation time in any one week.

"First Year - 5 days' vacation with 5 days' pay.

"Second through Fourth Year - 10 days' vacation with 10 days' pay.

"Fifth Year or More - 15 days' vacation with 15 days' pay."

* * *

"(d) Employees who have quit or been discharged prior to the completion of their vacation year, shall receive one-twelfth (1-12th) of the vacation benefits applicable under paragraph (b) for each one hundred (100) cumulative hours or more worked during his vacation year and are eligible for full vacation benefits if 1200 or more hours have been worked.

"(e) For purposes of this Section 19, all pro-rata vacation pay shall be allocable to the period worked and not to the period when paid."

* * *

"(i) Vacations shall be taken at a time mutually agreeable to the Employer and the employee. Promptly after January 1 of each year, each employee who has reason to believe that he will be entitled to a vacation, shall

> notify the Employer in writing, specifying the vacation time he desires. Prior to April 1, the Employer shall post a vacation schedule on the bulletin board. So far as possible, vacations shall be granted at the time specified by the employee. In cases of conflict, employees shall be given preference of choice according to seniority."

According to the unrefuted testimony of the assistant business agent of the claimant's union, section 19(e) was included in the contract because union members who received pro rata vacation pay could not immediately receive unemployment benefits upon layoff.

The Department of Employment allocated the vacation pay received by the claimant to the week October 22 through October 28, 1967 and concluded that the claimant was ineligible for benefits as to this week because he was not unemployed.

In oral argument before this board, counsel for the claimant contended that the money he received upon termination of employment should be considered as "supplemental unemployment benefits" within the meaning of section 1265 of the Unemployment Insurance Code and cited Powell v. California Department of Employment (63 A.C. 99, 45 Cal. Rptr. 136) to support this contention.

REASONS FOR DECISION

Section 1251 of the Unemployment Insurance Code provides:

> "1251. Unemployment compensation benefits are payable from the Unemployment Fund to unemployed individuals who are eligible under this part." (emphasis added)

Section 1252 of the code defines an unemployed individual as follows:

> "1252. An individual is 'unemployed' in any week during which he performs no services and with respect to which no wages are payable to him, or in any week of less than full-time work if the wages payable to him with respect to that week are less than his weekly benefit amount. . . ."

It is well established in this state that vacation pay constitutes wages (Jones v. California Employment Stabilization Commission (1953), 120 Cal. App. 2d 770, 262 P. 2d 91; Benefit Decisions Nos. 6014, 6102, 6649 and others).

The claimant here, at the time he filed his claim for benefits, was in the receipt of pro rata vacation pay and it is therefore necessary under section 1252 to decide the week "with respect to which" these wages are payable; that is, it must be decided the week to which these wages are to be allocated.

However, a more basic or fundamental issue than the mere allocation of vacation pay is presented in this case. This issue revolves around the question: Under the Unemployment Insurance Code, who may properly allocate the type of payment the claimant received? The union contract attempts to allocate the pro rata vacation pay "to the period worked and not to the period when paid."

This board has stated in Benefit Decisions Nos. 6670 and 6649 and others:

> ". . . As a general rule, the employer has the inherent authority to designate a vacation period and to allocate a vacation payment . . . . This right may be limited under a collective bargaining agreement, in which case, generally, the allocation must be in accordance with the terms of the agreement . . . ."

Certainly, an employer may designate for his employees the period during which employees shall

take a vacation with pay. It is the right of the employer, as limited by the terms of the contract, to decide if vacation pay will be given at the time the vacation is taken or at some other time.

However, once the employer-employee relationship is terminated, neither the employer nor the union contract may assert this type of control over former employees and the right to designate the vacation period no longer exists insofar as the employer's former employees are concerned.

When an individual, in receipt of vacation pay from a former employer files a claim for unemployment benefits, the Department of Employment is obligated to designate the period to which the vacation pay is to be allocated. This is true because it is the statutory duty of the Department of Employment to determine a claimant's eligibility for benefits (see section 1328 of the Unemployment Insurance Code).

The State Legislature has seen fit to permit the Director of Employment to delegate certain of his responsibilities; for example, in subsection (b) of section 1253 of the code the Director of Employment may approve places other than a public employment office as a place where an unemployed individual may register for work. The legislature has not permitted the Department of Employment to delegate its authority to determine a claimant's eligibility for benefits. Therefore, we conclude that regardless of the desires of an employer or the terms of a union contract, when an unemployed individual files a claim for unemployment benefits, the Department of Employment must determine the individual's eligibility for benefits and if such individual is in the receipt of vacation pay or pro rata vacation pay at the time the claim is filed, the Department of Employment is the only agency which may allocate such payments. Upon appeal this allocation may be affirmed, reversed, or modified by this board (section 1334 of the Unemployment Insurance Code).

The employer here provides two types of payment in addition to wages earned by its employees. After working a designated number of hours during a year an

employee is entitled to vacation with pay. If an employee is terminated prior to his working the required number of hours, he receives pro rata vacation pay.

The vacation pay received by an employee who has worked the proper amount of time is realizable only when that employee takes his vacation. The pro rata vacation pay is realizable only when an employee's employment is terminated; that is, an employee may not work and receive vacation pay or pro rata vacation pay. These amounts are realizable only on the happening of certain conditions. In the case of pro rata vacation pay, it is realizable only when the claimant's employment is terminated and we conclude, as did the court in the Jones case above, that the only logical and reasonable allocation of such pro rata vacation pay is to the period following employment. This was the allocation made by the Department of Employment when it held the claimant not unemployed during the week October 22 through October 28, 1967. We conclude that this allocation was proper.

We do not agree with counsel for the claimant that this pro rata vacation pay should be considered supplemental unemployment benefits within the meaning of section 1265 of the code. This section reads as follows:

> "1265. Notwithstanding any other provisions of this division, payments to an individual under a plan or system established by an employer which makes provisions for his employees generally, or for a class or group of his employees, for the purpose of supplementing unemployment compensation benefits shall not be construed to be wages or compensation for personal services under this division and benefits payable under this division shall not be denied or reduced because of the receipt of payments under such arrangements or plans.
>
> "This amendment is hereby declared to be merely a clarification of the original intention of the Legislature and is not a substantive change, and is in conformity with the existing administrative interpretation of the law."

We do not believe that the Powell case cited by claimant's counsel is applicable here. In the Powell case the individuals concerned received a sum of money designated as either "severance pay" or "dismissal pay" payable under the terms of the collective bargaining agreement. Apparently, the only way an individual could receive this severance pay or dismissal pay was to be terminated by the employer. The court held in the Powell case that the provisions of section 1265 of the code were so broad as to include severance or dismissal pay. In the instant matter, the collective bargaining agreement identifies the money received by the claimant as "pro-rata vacation pay" and provides that it is payable only to those individuals laid off prior to the completion of their vacation year. We believe that the money received by the claimant was pro rata vacation pay and not severance pay, dismissal pay or supplemental unemployment benefits.

DECISION

The decision of the referee is reversed. The claimant was in receipt of vacation pay allocable to the period following employment and was not unemployed within the meaning of section 1252 of the code for the week ended October 28, 1967.

Sacramento, California, March 11, 1969.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

ROBERT W. SIGG, Chairman

LOWELL NELSON

CLAUDE MINARD

JOHN B. WEISS

DON BLEWETT